UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COASTAL MARINE SERVICES, INC.	)	
	)	**CASE 21-CA-139031**
and	)	
	)	
INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS, LOCAL 5	)	

RESPONDENT COASTAL MARINE SERVICES, INC.'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Pursuant to Section 102.46(b) of the Board's Rules and Regulations, Respondent Coastal Marine Services, Inc. (Respondent or CMSI) submits this answering brief to the International Association of Heat & Frost Insulators and Allied Workers, Local 5's (Charging Party or the Union) exceptions to Administrative Law Judge Robert A. Giannasi's (the judge) March 1, 2016 Decision (Decision).

I. INTRODUCTION AND STATEMENT OF THE CASE

The case before the Board is simple: whether Respondent's Arbitration Agreement containing a class action waiver violates the National Labor Relations Act (NLRA or Act).[1] The Charging Party convolutes this straightforward case by filing 41 exceptions. These 41 exceptions to the judge's Decision—a decision which invalidated the Agreement as Charging Party requested—exploits the administrative law system and is obviously intended to waste Respondent's (and the Board's) time and resources.[2]

Charging Party asserts boilerplate exceptions it has filed in other actions with the Board. Most of the exceptions attack provisions or language not contained in the Agreement at issue in this case. Other exceptions attempt to employ laws entirely inapplicable to this case or outside of the Board's jurisdiction.

Further, virtually all of the Charging Party's exceptions are premised on theories and arguments that were not properly alleged in the complaint and are not sanctioned by

[1] Charging Party excepted to the judge's failure to recognize CMSI's Arbitration Agreement as a "Forced Unilateral Arbitration Procedure." CP Exception 4. However, Charging Party failed to present any arguments to support this petty exception. In this brief, the Arbitration Agreement will simply be referred to as "the Agreement."

[2] Notably, Charging Party has exhibited a pattern of lodging many of the same frivolous, baseless exceptions and arguments it lodges in this case. See, e.g., *FAA Concord H, Inc.*, 363 NLRB No. 136, slip op. (2016); *Hobby Lobby Stores, Inc. & The Committee to Preserve the Religious Right to Organize*, Case 20-CA-139745; *Fairfield Imports, LLC & Automotive Machinists Local Lodge No. 1173*, Case 20-CA-035259; *Tarlton And Son, Inc. and Robert Munoz*, Case 32-CA-119054. As it recently did in *FAA Concord*, 363 NLRB No. 136, slip op., the Board should either summarily reject or decline to even address most of Charging Party's arguments.

the General Counsel. Again, the sole issue before the judge (and now the Board) was whether the Agreement violates the Act by preventing employees from exercising their alleged Section 7 right to engage in class or collective litigation. Yet, the Charging Party appears to launch a personal crusade before the Board—an administrative body that cannot even rule on many of the Charging Party's exceptions. The Union's failure to assert exceptions based on relevant law and the actual Agreement at hand is indicative of its intent to file these exceptions in bad faith solely to waste the time and resources of Respondent. As a result, Respondent respectfully requests the Board disregard or reject all of the Charging Party's exceptions to the judge's decision.

II. ARGUMENT

A. The FAA Applies and Warrants Enforcement of the Agreement [CP Exceptions 5, 18-23, 26]

The Charging Party presents several exceptions to the judge's failure to find that the Federal Arbitration Act (FAA) does not apply to the Agreement. Specifically, the Charging Party argues the judge failed to recognize that the FAA does not apply because (1) there was no transaction, controversy, or dispute affecting interstate commerce; (2) there was no contract; (3) the FAA cannot override principles of Federal or State law; and (4) the Agreement prohibits collective actions that are not preempted by State or Federal law.

1. The FAA Applies to Arbitration Agreements in the Employment Context

The Charging Party claims that the Agreement does not evidence a transaction involving interstate commerce within the meaning of the FAA. However, Federal courts have repeatedly found that the FAA applies to an arbitration agreement covering the

employees of an employer who is engaged in interstate commerce. See, e.g., *CarMax Auto Superstores California, LLC v. Hernandez*, 94 F.Supp.3d 1078, 1101-02 (C.D.Cal. 2015); *Montes v. San Joaquin Community Hospital*, No. 1:13–cv–01722–AWI–JLT, 2014 WL 334912, *5 (E.D.Cal. Jan. 29, 2014); *Abdullah v. Duke University Health System, Inc.*, No. 5:09–CV–8–FL, 2009 WL 1971622, *3 (E.D.N.C. July 8, 2009); *Collie v. Wehr Dissolution Corp.*, 345 F.Supp.2d 555, 561 & fn. 2, 3 (M.D.N.C. 2004). This is because the Supreme Court has interpreted the FAA to apply to any transaction *affecting* interstate commerce. See *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2000).

Circuit City specifically examined whether arbitration agreements in the employment context are governed by the FAA; the Court found in the affirmative. The relevant inquiry is whether the employment relationship impacts commerce via *the employer's* impact on commerce. See *McElveen v. Mike Reichenbach Ford Lincoln, Inc.*, No. CA 4:12-874-RBH-KDW, 2012 WL 3964973, at *1 (D.S.C. Aug. 22, 2012) (emphasis added); *Slaughter v. Stewart Enterprises, Inc.*, No C 01-01157MHP, 2007 WL 2255221 (N.D.Cal. Aug. 3, 2007).[3]

Here, there is no doubt that Respondent is engaged in or impacts interstate commerce. CMSI buys parts and services from out of state to install on its clients' ships. See, e.g., *Bhan v. NME Hospitals*, 669 F.Supp. 998, 1011 (E.D.Cal.1987) (finding a hospital's activities were in interstate commerce where its chemicals, equipment, and supplies used to provide anesthesia were purchased and shipped in interstate

[3] The Charging Party cites to *Slaughter* for the proposition that the FAA does not apply to an employment arbitration agreement; however, *Slaughter* is easily distinguishable from this case. In *Slaughter*, the court determined that the FAA did not apply to a funeral employee where the *employer* was not engaged in interstate commerce.

commerce). Further, the ships that CMSI repairs are used for several purposes, including interstate travel. Moreover, the Charging Party admits that "Respondent is engaged in ship repair business that may impact interstate commerce . . . ." CP Brief, 7:15-18.

The entirety of this action being before the Board is based on the assertion that Respondent is engaged in interstate commerce. Otherwise, the Board would have no authority to rule on Respondent's Agreement. The Charging Party cannot have it both ways. It cannot allege that Respondent is not engaged in interstate commerce so that the FAA does not cover the Agreement, but then allege that Respondent is engaged in interstate commerce so that the Board has jurisdiction to decide whether the Agreement is lawful under the Act.

Respondent's business impacts interstate commerce. The approved stipulation of facts confirms as much. As a result, the Agreement is governed by the FAA.

2. An Employment Contract is not Necessary to Apply the FAA to the Agreement

The Charging Party also excepts to the judge's failure to find that the FAA does not apply because no employment contract exists. The Board should dismiss this argument. It is not necessary for there to be a physical employment contract in order for the FAA to govern an arbitration agreement. See, e.g., *Berkley v. Dillard's, Inc.*, 450 F.3d 775, 777 (8th Cir. 2006).

In *Berkley*, the Eighth Circuit found that an employer's arbitration agreement "was part of a larger offer of a unilateral contract of at-will employment" that an employee could accept. Id. It is irrelevant whether there was a contract for employment, because employees who work for employers that impact interstate commerce can be subject to

arbitration agreements under the FAA. The Union's exception therefore fails and must be rejected.

3. It is Not Within the Board's Jurisdiction to Balance the FAA with other Federal or State Laws that are not the NLRA

The Charging Party next excepts to the judge's failure to find the FAA does not govern the Agreement because the FAA allegedly interferes with other Federal and State laws. Nothing about this request falls within the jurisdiction of the Board. The judge (and now the Board) had one issue to resolve: whether the Agreement violates the Act by restricting employees' rights to engage in concerted activity. It is not within the Board's power to determine whether the FAA "trumps the application of other federal statutes." Any contention that the FAA interferes with statutes that are not the NLRA is irrelevant and should not be addressed in this forum. It is the Supreme Court's job to determine whether the FAA improperly interferes with other federal statutes that provide rights for employees. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (balancing the interests of the ADEA and the FAA in determining that arbitration agreements can compel employees to bring claims under the ADEA in arbitration).

4. The Board Cannot Decide Whether the Agreement Would Prohibit Collective Actions Under State Law

The Charging Party further tasks the Board with determining whether the Agreement would prohibit collective actions that are not preempted by the FAA under State law. The Union specifically points to California's Private Attorney General Act (PAGA), which allows employees to step into the shoes of the California Attorney General to bring various actions against employers on behalf of aggrieved employees. This is more troubling than expecting the Board to rule on the lawfulness of the Agreement under

various Federal laws. The Board has no authority to interpret California law, including whether the Agreement is unlawful for restricting actions under State law.

Even if the Board was authorized to interpret California laws, the Agreement is enforceable. Contrary to the Charging Party's contentions, there is no dispute that the Agreement applies in California. In fact, the Agreement is specifically titled, "Employment At-Will and Arbitration Agreement – California." Paragraph 2 of the Agreement states that the employee and Respondent agree to arbitrate claims arising from employment "under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitrations Act . . . ."

While *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), arguably does not permit the waiver of required arbitration of actions brought under PAGA, the Charging Party fails to disclose the entire holding of the *Iskanian* court. Specifically, the court found that an agreement waiving class actions itself is **enforceable** to all other actions with the exception of a claim brought under PAGA. Id. at 154-55. If an arbitration agreement containing an illegal waiver to bring a PAGA action can be severed, then the rest of the agreement preventing class arbitration survives. Id. at 154.

Importantly, *Iskanian* also rejected the Board's decision in *D.R. Horton*, holding that in light of the FAA's "'liberal federal policy favoring arbitration[,]'" Section 7 and 8 of the NLRA do not represent "a contrary congressional command" overriding the FAA's mandate and, therefore, class action waivers in arbitration agreements do not violate the Act. Id. at 142.

The Union also argues in support of its exceptions that employees are unable to bring labor code claims before the labor commissioner. The Charging Party has either

not read or does not fully understand the language in the Agreement. Nowhere in the Agreement does it prevent employees from bringing claims before administrative agencies as required by law. The Agreement unequivocally states that employees still maintain the right to bring administrative proceedings before the California Department of Fair Employment and Housing. Further, nothing prevents employees from exhausting necessary administrative remedies before the Division of Labor Standards Enforcement, the administrative agency responsible for pursuing labor code violations against employers in California. Should the labor commissioner determine that it will not pursue administrative proceedings on behalf of the employee, the employee is then entitled to bring a cause of action pursuant to the Agreement.

The Charging Party has no leg to stand on in expecting the Board to evaluate Federal and State laws in comparison with the FAA to determine whether the Agreement is lawful. The Board has the one duty of applying the NLRA to the Agreement. Therefore, any exceptions alleging issues to the contrary must be dismissed.

B. The Charging Party's Exceptions to the Judge's Failure to Award Unorthodox Remedies are Improper [CP Exceptions 9-15]

The Charging Party presents seven exceptions regarding the remedy in the case—a case where the judge found **in favor of the Charging Party**. Among the exceptions, the Charging Party insists that Respondent permanently post an employee rights notice; include notices with all pay checks along with mailing separate notices to all employees; and have a Board Agent read the notice and answer questions from employees outside the presence of Respondent while on company time. The Charging Party also demands that Respondent toll the statute of limitations for **all** claims that may have accrued while the Respondent maintained the Agreement. All of these requests for extraordinary relief

were not sought in the complaint by the General Counsel. The Charging Party offers no logical or legal support for these proposed remedies.[4]

The Charging Party has argued in several other cases that unrequested, novel remedies should be imposed against employers. See, e.g., *FAA Concord*, 363 NLRB No. 136, slip op. (2016); *Hobby Lobby Stores, Inc. & The Committee to Preserve the Religious Right to Organize*, Case 20-CA-139745; *Fairfield Imports, LLC & Automotive Machinists Local Lodge No. 1173*, Case 20-CA-035259; *Tarlton And Son, Inc. and Robert Munoz*, Case 32-CA-119054. In *Concord*, the Charging Party recycled the argument that the statute of limitations should be tolled for an arbitration employees were participating in. The Charging Party also demanded that Respondent's attorney read the decision and order to Respondent's employees. The Board specifically rejected the Charging Party's request for additional remedies. See id. at 1 fn. 2. There is no reason for the Board to come to any other conclusion in this case.

Importantly, statutes of limitation are set by the legislature, and it would be completely outside the realm of the Board to arbitrarily extend the statute of limitations for any claims arising out of employment with Respondent. For example, the Charging Party posits that the Board step into the shoes of the State of California in extending the State statute of limitations for any potential labor code violations. The reason this has not been done before, and why the Board rejected the Charging Party's request for the same in *Concord*, is because it is improper and outside the scope of the Board's authority.

[4] The Charging Party relies on a case study conducted 50 years ago to support any assertion that a Board Agent should be required to read the decision to employees on company time outside the presence of the employer. However, the Charging Party attaches no such case study and fails to provide any citation to the case study or any Board precedent approving of such unorthodox remedies.

The Charging Party offers no authority to justify these additional outrageous remedies outside what has already been ordered by the judge. As a result, the Charging Party's exceptions to expand the remedies available must all be rejected.

C. The Agreement is not Unlawful [CP Exceptions 25, 27-38, 40]

The Charging Party raises multiple arguments for why the judge should have alternatively found the Agreement unlawful. But none of these theories was advanced by the General Counsel. See *Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42, slip op. at 2 fn. 4 (2012) ("[W]e decline to consider arguments in the Charging Party's brief that are inconsistent with the Acting General Counsel's theory of the case as set forth in the complaint."); *Electrical Workers IUE Local 44 (Paramax Systems)*, 311 NLRB 1031, 1033 (1993) (same). For that reason alone, all of the Charging Party's exceptions not based on the complaint should be disregarded. However, there are also substantive reasons to reject the Charging Party's position.

1. The Agreement Does Not Foreclose Court Review [CP Exception 25]

The Charging Party excepts to the judge's failure to find that the Agreement attempts to foreclose court review. The Charging Party argues that "any non-appealability clause in arbitration agreement *[sic]* is invalid under the FAA." CP Brief 22:10-14. The Board should disregard this exception entirely.

The Charging Party's argument is nonsensical, as no such "non-appealability clause" exists in *this* Agreement. The Agreement does contain a clause that the arbitrator's final opinion is subject to affirmation, reversal, or review of the record and arguments of the parties by a second arbitrator. Agreement, ¶ 6. This further evidences the Union's intention to bring these exceptions in bad faith and to waste the Board's and

Parties' time. However, the Agreement is also governed by the FAA and California Arbitration Act, which specifically allow "[a]ny party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award." Cal. Civ. Proc. Code § 1285; see also, 9 U.S.C. § 10(a). Therefore, Charging Party's argument is inapplicable, and should be rejected by the Board.

2. Preventing Joinder of Actions does not Render the Agreement Unlawful [CP Exception 27]

The Union excepts to the judge's failure to find that the Agreement unlawfully prohibits group claims that are not class actions or other collective actions. In its brief, the Union argues that employees have a right to bring collective disputes as a group, and that the Agreement prohibits consolidation or joinder of other claims or controversies with other employees. The Board should reject this exception.

It is true that the Agreement prevents employees from joining claims with other employees. This is the essence of the issue at hand: whether preventing employees from bringing collective actions violates the Act. The Union urges the Board to recognize the difference between bringing a class action and traditionally joining a lawsuit through the rule of joinder found in the Federal Rules of Civil Procedure. Such distinction is not necessary. The Union is asking the Board to find that the Agreement is unlawful for prohibiting two employees from bringing the same claim at the same time against the employer. The judge has already done so, and therefore, no additional exception to the Decision is necessary.

The Union also incorrectly asserts that the Agreement prevents employees from acting anonymously. In the rare circumstance that an employee is entitled to move

forward with an action anonymously,[5] there is nothing in the Agreement that stops an employee from doing so through the arbitration procedure. Unsurprisingly, the Union fails to provide any evidence in which the Agreement prevents the ability to bring an action anonymously, or point to a single instance in which an employee of Respondent has been unable to bring an action in arbitration anonymously.

The judge already accepted the Charging Party's argument that employees should be able to join together to bring actions against Respondent. Respondent thoroughly addressed this argument in its brief in support of its own exceptions. However, there is no new argument for the Union to stand on in appealing the judge's decision. Therefore, this redundant argument must be disregarded.

3. The Agreement does not Interfere with Employees' ability to Boycott, Strike, or Engage in other Concerted Activities [CP Exception 28]

The Union excepts to the judge's failure to find the Agreement invalid because it allegedly interferes with Section 7 rights to engage in concerted activity such as boycotts, strikes, walkouts, and "other activities." Charging Party again ignores the plain language of the Agreement. Paragraph 4 of the Agreement explicitly states:

> **I acknowledge that this agreement is not intended to interfere with my rights to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations Act, and that I will not be subject to disciplinary action of any kind for opposing the arbitration provisions of this agreement.**

Nothing about paragraph 4 of the Agreement can be construed as prohibiting employees from engaging in a public protest or labor strike. All concerted activity is not

[5] Federal courts, including the Ninth Circuit, have permitted parties to proceed anonymously when special circumstances justify secrecy. See, e.g., *Doe v. Madison School Dist. No. 321,* 147 F.3d 832, 833 fn. 1 (9th Cir.1998), vacated on other grounds, 177 F.3d 789 (9th Cir. 1999) (en banc); *United States v. Doe*, 655 F.2d 920, 922 fn. 1 (9th Cir.1981) ("In this circuit, we allow parties to use pseudonyms in the "unusual case" when nondisclosure of the party's identity is necessary ... to protect a person from harassment, injury, ridicule or personal embarrassment.").

only permitted, but encouraged by the simple wording on the face of the Agreement. The Charging Party trails off in a footnote that the sentence asserting employees will not be disciplined for opposing the arbitration provision does not protect employees from discipline if the employee strikes. However, paragraph 4 specifically states that the Agreement does not interfere with any rights protected by the National Labor Relations Act. Certainly the Act is enough to protect employees should they ever be disciplined for engaging in concerted activity, such as going on strike. The Charging Party remains consistent in not providing any support that an arbitration agreement with a class action waiver has **ever** been found to prohibit strikes, walkouts, picketing, "or other expressive activity." This meritless argument should be rejected by the Board.

4. The Agreement does not Unlawfully Prohibit Employees from Assisting Each Other [CP Exception 29]

The Charging Party excepts to the judge's failure to find that the Agreement prevents employees from helping each other at work. In its brief, the Charging Party argues that the Agreement prevents employees form helping each other bring individual claims. The Union exaggerates that employees are not able to utilize "open door policies" to speak to supervisors about resolving simple employment disputes. The Charging Party's exaggeration with no legal support is telling and indicative of its bringing these exceptions in bad faith.

There is no case law in which a court or the Board has found that an arbitration agreement such as the one at issue precludes employees from speaking with supervisors regarding basic disputes. Instead, the Agreement is designed to streamline resources and encourage judicial efficiency when there is a legal dispute between the Respondent and an employee regarding the employee's employment with Respondent.

The Union further argues in its supporting brief to its exceptions that the Agreement prevents employees from invoking the doctrine of res judicata or collateral estoppel. This argument is illogical. The doctrines of res judicata and collateral estoppel have nothing to do with whether employees may waive the procedural right to bring a class action in arbitration. Res judicata prevents the same claim brought by the same party from being relitigated in the future. Collateral estoppel prevents issues that have been fully and fairly litigated from being presented in future litigation. However, Respondent would be unable to assert res judicata or collateral estoppel against individual employees based on previous arbitration decisions if they were not present to fully litigate the first lawsuit. Pursuant to the Agreement, individual employees maintain the right to litigate their own cases through arbitration.

Further, the Charging Party again fails to cite any legal authority to support its argument that the NLRA protects employees' ability to assert the procedural devices of res judicata or collateral estoppel, or that the Agreement itself prevents employees from using these devices in arbitration. As such, the Charging Party's exception must be dismissed.

5. The Agreement does not Prevent Salting [CP Exception 30]

The Union excepts to the judge's failure to find that the Agreement is unlawful because it prevents "salting,"[6] and also applies to employees after their employment ends. Again arguing without legal support, Charging Party contends that the Agreement

[6] "Salting a job" has been defined as "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Tualatin Electric, Inc.*, 312 NLRB 129, 130 fn. 3 (1993). A "salting campaign" can involve both bona fide applications and "unions submit[ting] batched applications on behalf of individuals who were neither aware of the applications nor interested in employment opportunities with the employer," or individuals submitting applications in order to create a basis for unfair labor practice charges. See Toering Electric Co., 351 NLRB 225, 225 (2007).

prevents employees from improving working conditions or acting collectively after terminating employment with Respondent. While salting is controversial and will not be considered protected activity under the Act in certain circumstances, see, e.g., *Toering Elec. Co. & Foster Elec.*, 351 NLRB 225 (2007), there is also no supporting evidence presented by the Union that the Agreement prevents employees from improving working conditions or even moving to be represented by a labor organization.

Further, the Charging Party fails to offer any supporting evidence that an arbitration agreement is not enforceable because it applies to employees after their employment ends. If an employee resigns because of "miserable working conditions," as the Charging Party claims, the employee is welcome under the Agreement to bring an action against Respondent seeking damages and injunctive relief to prevent the miserable working conditions from continuing. This exception is therefore meritless and is clearly a tool used by the Union to unduly harass Respondent.

6. The Agreement does not Foreclose Group Claims Brought by a Union [CP Exception 31]

The Union excepts to the judge's failure to find the Agreement is unlawful because it allegedly forecloses group claims brought by a union as the representative of an employee. The Charging Party fails to present any argument in support of this exception in its brief. It merely states conclusions that the Agreement prevents union representation. Despite the Charging Party's unfounded conclusions, **the Agreement does not prevent a union from representing its members** in arbitration proceedings. The Charging Party only points to case law that suggests unions have associational standing to assert claims on behalf of its members.

The Charging Party leaves out an important detail in this case: the employees of CMSI are not represented by any union. Further, nothing in the Agreement dictates how the employee is represented at arbitration. While the Charging Party would like to insist on its right to represent CMSI employees at arbitration proceedings, it has no standing to do so, because it has no members at issue. See, e.g, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 281 (1986) (holding that a labor union may have standing solely as the representative of its members).

Regardless of the Union's inability to clear this constitutional hurdle, nothing in the Agreement prevents an employee from requesting that a union, or anyone else for that matter, represent them at arbitration. This exception must therefore be rejected.

7. The Agreement does not Impose Additional Costs on Employees [CP Exception 32]

The Charging Party excepts to the judge's failure to find the Agreement is unlawful because it supposedly imposes additional costs on employees to bring employment related claims, which allegedly interferes with Section 7 rights. The Charging Party, again outside the legal theory of the General Counsel, attempts to support its exception by arguing that the Agreement is unlawful because it allegedly requires employees to pay arbitration costs. Charging Party fails to point out one instance in which an employee of Respondent has brought a claim that was compelled to arbitration, let alone that the employee had to share in the costs of arbitration. Nothing in the Agreement requires that employees pay for the cost of arbitration, which is consistent with California case law requiring that employers bear the costs associated with arbitration. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

There is no additional cost placed on employees who pursue claims against Respondent through arbitration. The Charging Party's lack of evidence to the contrary is telling of the Union simply bringing boilerplate exceptions, and its exception should therefore be rejected.

8. Non-Employees do not have Standing to Bring a Lawsuit Covered under the Agreement Against Respondent [CP Exception 33]

The Charging Party excepts to the judge's failure to find the Agreement is unlawful because it allegedly prohibits an employee of another employer from assisting an employee of Respondent with bringing a claim. The Charging Party illogically argues that individuals who are not employed by Respondent should be entitled to join in a claim brought by one of Respondent's employees. The Agreement does not prevent any such activity, but common sense does.

While it is true that employees may engage in concerted activities with employees from other employers, it does not automatically give other employees the right to join in a cause of action an employee is bringing against his employer for individual damage done in the course of employment. It is completely unrealistic to assume, as Charging Party does, that an employee from Company A has the right to join as a plaintiff with an employee from Company B to pursue Employee B's claims that Company B discriminated against Employee B.

To the extent that employees may engage in concerted activity and pursue rights provided for under the Act with employees from other companies, nothing in the Agreement prevents that from occurring. In fact, the Agreement plainly states that it does not prevent employees from engaging in protected activity under the Act. This exception is unfounded and illogical, and therefore should be rejected.

9. The Agreement does not Apply to Other Employers [CP Exception 34]

The Union excepts to the judge's failure to find that the Agreement is unlawful because it applies to other parties that are not Respondent. In support of its exception, the Charging Party argues that the Agreement is unlawful because the Agreement allegedly extends to other employers. This is not an accurate statement. While the Agreement binds Respondent and Respondent's owners, officers, directors, managers, employees, or agents, this is not extended to individuals who do not work for Respondent. To the extent that there are any disputes either brought by or against any director or owner, they are also employees under the Agreement, and the Agreement mutually requires Arbitration from both parties. As a result, the Charging Party's convoluted argument should be rejected.

10. Whether the Agreement Violates ERISA is Outside the Board's Jurisdiction [CP Exception 35]

The Union excepts to the judge's failure to find that the Agreement violates ERISA. In its brief, the Union argues that because the Agreement extends to any dispute, it would include requiring employees to bring an action under ERISA through Respondent's arbitration procedure instead of the benefit plan's procedures for resolving disputes. Benefit plan disputes are disputes with any health insurance company, and are not the claims or disputes governed by the Agreement's arbitration clause.

Regardless, the Board does not have the capability to legally decide in favor of the Charging Party's exception. The Board's jurisdiction is limited to disputes over alleged unfair labor practices. 29 U.S.C. § 160(a). The Supreme Court has interpreted this to mean that the Board has no authority to interpret or apply statutes other than the NLRA,

unless there is a successful argument that the NLRA preempts the federal law. See *Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 357 U.S. 93, 108-11 (1958); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140, 149-50 (2002).

As a result, the Charging Party's attempt to have the Board resolve whether the Agreement is unlawful under ERISA is misguided and contrary to Federal law and Supreme Court jurisprudence. The Charging Party has not presented any argument that the Act preempts ERISA, nor did it provide any support indicating that the Board is authorized to interpret ERISA to establish the lawfulness of this Agreement. Because the Charging Party's exception calls upon the Board to interpret Federal law outside of its jurisdiction, the exception must be rejected.

11. The Agreement does not Restrict Employees from Defending Potential Claims Brought by the Employer [CP Exception 36]

The Charging Party excepts to the judge's failure to find the Agreement is unlawful because it allegedly prevents employees from jointly defending against claims brought by the employer. The Charging Party argues in its brief that "employees have the right to band together to defend against claims made by the employer or other employees." CP Brief, 31:16-17. The Union provides no legal authority to support this assertion, as required by the Board's Rules and Regulations. Instead, it presents incomplete hypothetical situations in which an employer may bring claims against multiple employees, such as recovering overpayment of wages.

The Charging Party fails even to cite to an actual situation in which an employer has ever gone after multiple employees to recover wages, and employees have been unable to act concertedly. Nowhere in the Act does it grant the right to employees to defend against their employer in a collective manner. Further, the Union again failed to

read the plain language of the Agreement, which states that should the employer have a claim against an employee, it will also proceed in arbitration on an individual basis. Respondent would not be able to bring an action against multiple employees as the Union's hypothetical inaccurately poses. Because there is no authority supporting the Charging Party's exception, and the exception is contrary to the plain language of the Agreement, it must be dismissed.

12. The Agreement is not made Unlawful by the Norris-LaGuardia Act, and Further Cannot be Addressed by the Board [CP Exception 37]

The Charging Party excepts to the judge's failure to find the Agreement is unlawful under the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. In its brief in support of this exception, the Charging Party again attempts to invent its own Supreme Court jurisprudence. The Board has no authority to determine whether the Norris-LaGuardia Act has been violated, as it falls outside of its expertise in interpreting the NLRA. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("It is undisputed that the NLGA is outside the Board's interpretive ambit.").

The Charging Party claims in two separate, unrelated sections of its supporting brief that the Agreement is a "yellow dog" contract. The Agreement at issue here is certainly not a "yellow dog" contract. Even if the Board had the authority to determine the lawfulness of the Agreement under the Norris-LaGuardia Act, the Agreement would in fact be lawful.

The Norris-LaGuardia Act simply prohibits Federal courts from enforcing private agreements that require an employee to promise that he or she will withdraw from or refuse to join, become, or remain a member of any labor organization. See 29 U.S.C. § 103(a). One glance at the Agreement in this case shows that this is not an agreement

that restricts employees from joining labor unions. In fact, the Agreement **encourages** employees to engage in concerted activity, and makes clear that employees will not be disciplined for doing so. The Union's exception must therefore be rejected.

13. Other Charges in the Complaint Have Been Properly Bifurcated and are not at Issue [CP Exception 38]

The Charging Party randomly excepts to the judge's failure to find that other rules maintained by Respondent that were alleged in the complaint render the Agreement unlawful. In its brief in support of this exception, the Charging Party appears to contend that the purportedly unlawful rules maintained in Respondent's employee handbook, specifically, the rules governing email use and sharing information about other employees to an outside source, render the separate and distinct Agreement at issue here useless. The language of the other allegedly unlawful rules in Respondent's handbook has since been settled and bifurcated from the issue presently before the Board.[7]

It is unclear what the Charging Party is attempting to accomplish other than forcing the Board and Respondent to address baseless exceptions. The policies dealing with email and disclosure of information have nothing to do with whether a separate arbitration agreement that contains a class action waiver restricts concerted activity. The policies have no independent bearing on the Agreement's lawfulness. As a result, this futile argument must be disregarded.

[7] The Charging Party is correct in stating that it appealed the settlement regarding the other rules between the General Counsel and Respondent; however, it again fails to provide the complete story. The Appeals Division specifically overruled the Charging Party's exceptions to the two policies it refers to in its supporting brief to its exceptions.

14. The Religious Freedom Restoration Act (RFRA) does not Apply [CP Exception 40]

The Charging Party makes one final senseless exception to the judge's failure to find that the Agreement is unlawful: that concerted activity is a religious practice that is hindered by the Agreement and should therefore be protected by the RFRA. In its brief in support of this exception, the Charging Party surprisingly attempts to argue that helping each other at work is a fundamental religious principle that "is the essence of religion." The Charging Party goes on to discuss the RFRA, but fails to provide any actual legal support for its argument.

Not only is the Charging Party not allowed to invent its own religion to be protected under the RFRA, the RFRA only applies to government actions. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). The Charging Party confirms this throughout its supporting brief where it cites the RFRA.

The law is clear that even if there was a religion involved, the RFRA still does not apply to a private employer such as Respondent. Respondent is undisputedly a private employer, and is not the Federal government. The RFRA is entirely inapplicable, and there is simply nothing to legally support the Charging Party's argument. In cases under the NLRA, the RFRA has been raised by employers as a defense against NLRB action, as the NLRB is part of the ***Federal government***. See, e.g., *Carroll College, Inc.*, 345 NLRB 254, 257 (2005).

Further, it cannot be overstated that the Board has no authority to interpret the RFRA, including whether the Agreement at issue violates the RFRA. This was not

addressed in the complaint and, therefore, the argument and exception are improper and should be disregarded.

In sum, none of the Charging Party's exceptions are proper for the Board to consider. The Charging Party detours from the legal theories of the General Counsel and attempts to have the Board consider arguments that are outside its jurisdiction and are nonsensical. Regardless, there is no substantive support for the Charging Party's exceptions, and they therefore should be rejected.

D. The Check the Box Provision and Interrogations [CP Exception 24]

The Agreement includes a box that employees can check if they do not want to waive any substantive or procedural rights they may otherwise have to bring an action on a class, collective, private attorney general, representative, or other similar basis. The Union excepts to the judge's failure to find that this "opt-out" box constitutes a form of unlawful interrogation. The Union's exception should be rejected for several reasons.

1. <u>The Issue was Not Fully and Fairly Litigated</u>

The issue of whether the "opt-out" box constitutes a form of unlawful interrogation was not fully and fairly litigated throughout the complaint. See *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43, 44 (2003) ("It is . . . well established that it is inappropriate to make unfair labor practice findings that were not fully and fairly litigated.") (citing *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995))); *Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42, slip op. at 2 fn. 4 (2012) ("[W]e decline to consider arguments in the Charging Party's brief that are inconsistent with the Acting General Counsel's theory of the case as set forth in the complaint.").

Neither the charge nor the complaint alleged that the opt-out provision itself was unlawful. Moreover, the case was decided on stipulated facts, and nothing in the stipulation specifically referred to the opt-out provision or suggested that an interrogation theory was before the judge.[8] Consequently, the judge did not err by not addressing the issue. See *24 Hour Fitness USA, Inc.*, 363 NLRB No. 84, slip op. at 2 fn. 5 (2015) ("We reject the Acting General Counsel's exception that the judge erred in failing to find that the nondisclosure provision independently violated the Act. . . . [W]e find that the legality of the nondisclosure provision was not fully and fairly litigated."). The issue was not properly before the judge, and cannot be considered now at the 11th hour.

2. The Charging Party's Theory is Premised on Inapplicable Case Law

For the reasons set forth by Member Johnson in his dissent in *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 13 (2015), the Union's interrogation theory is premised on Board cases that are simply not applicable to this situation. In *Allegheny Ludlum Corp.*, 333 NLRB 734, 740 (2001), enfd. 301 F.3d 167 (3d Cir. 2002), the Board held, consistent with prior case law, that an employer may not lawfully require employees to make "an observable choice that demonstrates their support for or rejection of [a] union." But in *Allegheny* and the cases cited therein, unlike here, the employees were forced to make a choice reflecting their views on unionization, and they were forced to make that choice to a representative of management who had the authority to directly affect their working conditions. These are critical distinctions.

[8] The Union objected to the partial stipulation of facts, arguing that the judge permit a hearing on a number of discrete issues, including that the FAA does not govern the dispute, the Religious Freedom Restoration Act applies, and various additional remedies should be considered. Notably, the Union's objection *did not* reference or even allude to an interrogation theory premised on the opt-out provision.

Interrogating and polling employees about their union activities under certain circumstances is unlawful "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953). There is no parallel "natural tendency" with respect to employees electing not to agree to waive their right to pursue claims on a class or collective basis. The "fear" as it relates to union sentiments is grounded in perceptions that employers may treat pro-union employees differently than others. No such history exists with respect to arbitration agreements.

Moreover, interrogating and polling employees about their union activities is not per se unlawful, but depends on the coercive nature of the interrogation or polling in light of surrounding circumstances. See *Blue Flash Express*, 109 NLRB 591 (1954). In those cases where employers were found to have acted coercively by requiring employees to make "an observable choice" about something that might reveal their union sentiments, the Board's principal focus is on *who* the observer is. See, e.g., *Kurz-Kasch, Inc.*, 239 NLRB 1044 (1978) (finding preelection distribution of "Vote No" buttons to employees *by their supervisor* constituted unlawful interrogation because the offer of the button by the supervisor and the acceptance or refusal by the employee required the employee to make an observable choice in the presence of the supervisor).

In this case, the record is silent as to whom employees are required to make the "observable choice" of whether to opt out of the class or collective action waiver. Here, the employee has the option to check the box to opt-out of the class action waiver in private, and the Agreement is quietly returned to the Human Resources office. It is not a public interrogation maintained by supervisors or other members of management

intended to intimidate and ridicule employees who wish to opt-out of the Agreement's class action waiver.

However, because the record is silent, even if the General Counsel had advanced the theory proffered by the Union, he would have failed to meet his burden of proof. See *Dorey Electric Co.*, 312 NLRB 150, 153 (1993) (recognizing that a mere suspicion is not "sufficient evidence on which to base a conclusion that the General Counsel's burden of proof has been met").

3. The Charging Party's Theory Is Inconsistent With Supreme Court Precedent

As a final matter, the Union's post-hoc theory that the opt-out provision is an unlawful interrogation squarely conflicts with United States Supreme Court precedent. The Supreme Court has approved mandatory arbitration agreements for employment-related claims. See *Gilmore v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Union's proposed construction of the NLRA as prohibiting employers from asking employees to elect whether to be bound to such an agreement effectively overturns that decision. How can an employee ever agree with an employer to submit disputes to arbitration—as *Gilmore* says they can do—if the employer cannot ask the employee whether he wants to enter into such an agreement? As such, because employees have the right to enter into an agreement with their employer to arbitrate employment disputes, any exception put forward by the Charging Party asserting the contrary must be rejected.

E. Submitting the Stipulated Record was Appropriate [CP Exceptions 16, 41]

The Union excepts to the judge allowing the parties to submit a stipulated record containing relevant facts for this matter, as well as the judge's failure to sustain the

Union's objections to the stipulated record. In support of its exceptions, the Union argues that it was entitled to submit other facts and theories to make them art of the record, including its RFRA argument discussed above. These exceptions must be rejected.

The Board has implemented changes to its Rules and Regulations so that parties may submit stipulated facts. See OM Memo 02-89. To the extent that the Charging Party claims submission of a stipulated record prevented it from putting on evidence as to the RFRA applying to the Agreement, the Charging Party has suffered no prejudice. This is because the Charging Party's arguments are irrelevant and beyond the scope of the complaint. They are outside the legal theories of the General Counsel and the Board has no authority to interpret a Federal law such as the RFRA.

The Charging Party also alleges in its supporting brief that it should have been able to present that the employer holds safety meetings where a notice could be read to employees. This fact is immaterial and is not the only way to provide information to employees. The record clearly establishes the facts necessary for the judge, and now the Board, to make a decision as to the sole issue: whether Respondent's maintaining of the Agreement was an unfair labor practice as described under the Act.

The judge correctly allowed the parties to submit a stipulated record, and this exception should therefore be denied.

F. This Case Does Not Give Rise to a Need to Reconsider *Lutheran Heritage* [CP Exception 39]

The Union excepts to the judge's failure to find that the Agreement is unclear and ambiguous as to what it covers. The Union then bootstraps onto that exception an argument that the Board should overrule its decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). More specifically, the Union brazenly encourages the Board to

throw the *Lutheran Heritage* rule "into the trash pile of discredited doctrines." (CP Brief 36). The Board can easily reject the Union's request.

First, the Union once again impermissibly presents an issue that was not part of the General Counsel's theory. See *Kent Hospital*, 359 NLRB No. 42, slip op. at 2 fn. 4 ("[W]e decline to consider arguments in the Charging Party's brief that are inconsistent with the Acting General Counsel's theory of the case as set forth in the complaint.").

Second, even if the General Counsel had pursued the theory that *Lutheran Heritage*'s reasonableness standard should be overruled, this is certainly not the case to do so. The judge found, consistent with the Board majority's approach in *D.R. Horton* and *Murphy Oil*, that the Agreement expressly restricts Section 7 activity of pursuing class and collective actions. If the Board adopts that finding, *Lutheran Heritage*'s reasonableness standard is not even at issue. See *Lutheran Heritage*, 343 NLRB at 647 ("If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing [that, inter alia,] . . . employees would reasonably construe the language to prohibit Section 7 activity . . . .").

Third, contrary to the Union's understanding, *Lutheran Heritage* did not expressly or implicitly overrule *Lafayette Park Hotel*, 326 NLRB 824 (1998). It did not create a framework for analyzing employer rules that is markedly different from the framework applied in *Lafayette Park*. See *Lutheran Heritage*, 343 NLRB at 646 (adopting the judge's findings and conclusions applying *Lafayette*). The Union's exception as to overruling *Lutheran Heritage* should therefore be rejected.

G. There is no Evidence that Employees have not Asserted Class Claims [CP Exception 7]

The Charging Party excepts to the judge's failure to recognize that the employees had not asserted any class or collective claims because they were prohibited from doing so by the Agreement. There is no supporting argument in its brief for this exception.

The closest the Charging Party comes to providing any support for this exception is the assertion that there is no controversy present for the purpose of the FAA. The Charging Party provides no other evidence or support of its exception, and it therefore must be disregarded.

The Board's Rules and Regulations require that exceptions filed with the Board "shall concisely state the grounds for the exception." 29 C.F.R. § 102.46. Charging Party has failed to do so. Because the Charging Party's exception does not comply with Section 102.46, it must be disregarded in its entirety. See *Pratt Towers, Inc.*, 338 NLRB 61, n.4 (2002) ("The Respondent's exceptions merely cite to the judge's decision and fail to allege with particularity on what grounds the judge's purportedly erroneous findings should be overturned. In these circumstances, we find, in accordance with Sec. 102.46(b)(2) that the Respondent's exceptions on these points may be disregarded.").

Respondent's failure to provide any support or any evidence that the judge erred in not finding that employees were unable to bring class actions because of the Agreement is improper, and must therefore be disregarded.

III. CONCLUSION

The Union provides 41 disjointed, unintelligible exceptions to the judge's Decision, which appear to be brought in bad faith simply to unduly burden Respondent. The judge's

finding the Agreement invalid was the exact result the Charging Party sought in filing a charge with the Board. Instead of allowing the General Counsel to exercise its right to control the theory of this case, the Charging Party makes frivolous arguments often with no legal, factual, or logical support. These boilerplate exceptions attack provisions that do not exist in the Agreement at issue. The Charging Party also seeks to have the Board rule on irrelevant laws that are not only inapplicable to enforcing the Act, but are also outside the jurisdiction of the Board. Therefore, Respondent respectfully requests the Board disregard or reject all of the Union's exceptions to the judge's Decision.

Respectfully submitted this 12th day of April, 2016.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COASTAL MARINE SERVICES, INC.	)	
	)	**CASE 21-CA-139031**
and	)	
	)	
INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS, LOCAL 5	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2016, I e-filed RESPONDENT COASTAL MARINE SERVICES, INC.'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION, and immediately thereafter served it by electronic mail upon the following:

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